

# Military Justice: The Continuing Importance of Historical Perspective<sup>1</sup>

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In the half-century following enactment of the Uniform Code of Military Justice (UCMJ), the practice of military law has been shaped by both the push of contemporary events and the pull of history. The debates over enactment of the UCMJ and major amendments to the *Manual for Courts-Martial*, as well as the landmark arguments before our court, have been enriched by the skillful advocacy of lawyers and policy-makers imbued with a sense of history. In recent years, however, the historical antecedents of current practices have not received the same degree of attention. The diminished attention to the roots of contemporary military law may reflect the difficulty busy lawyers and public officials face in assimilating, digesting, and applying the rapidly expanding array of information available to the modern practitioner. In this article, by highlighting the role of historical perspective in the development of the military justice system, I hope to encourage a renewed interest in the use of history during consideration of contemporary issues in military law.

## The Development of the UCMJ in Historical Context

In our Nation's capital, we are surrounded by the symbols of history, such as the monuments and memorials to our great Presidents—Washington, Jefferson, Lincoln, and, most recently, Franklin Delano Roosevelt. From the dedication of the Roosevelt memorial in 1997 through the millennium celebrations of 1999, a great deal of attention has been given to his impact on the twentieth century.

One of Roosevelt's greatest strengths was his ability, in the darkest of times, to appeal to the best qualities in the American people. Of all his classic addresses to the public, perhaps none has had a greater impact or a more enduring legacy than his evocation of the Four Freedoms.<sup>2</sup>

The Four Freedoms theme was fashioned and dictated personally by President Roosevelt.<sup>3</sup> At the end of New Years Day, 1941, Roosevelt gathered with his staff late in the evening to review his proposed State of the Union address. Despite his personal popularity, Roosevelt faced considerable skepticism

about his policies in Congress, in the press, and amongst the general public.

Today, when democracy is triumphant in so much of the world, and when our nation enjoys relative prosperity and productivity, it may be difficult to visualize the desperate atmosphere that gripped the United States in 1941, on the eve of our entry into World War II. Despite the New Deal, much of the country remained plagued by unemployment and the continuing effects of the Depression. The domestic agenda was characterized by fundamental and bitter divisions over the proper responsibilities of government. In the field of foreign affairs, the nation was deeply divided between isolationists and internationalists—so divided that our armed forces, in terms of size and capabilities, were rated well behind most of the industrialized nations of the world.

In Germany, Italy, Russia, and throughout much of the world, dictatorships and totalitarian states were on the rise. The military and economic triumphs of Hitler and his emulators seemed to indicate that success lay in appeals to nationalism, prejudice, and the baser instincts of man.

The temptations were great to focus national policies upon appeals to fear, prejudice, or an insular nationalism. Roosevelt had a different vision, borne of his confidence in the American people, his understanding of history, his personal triumphs over adversity, and his fundamental belief that freedom—based upon classic notions of the democratic process and individual liberty—was the key to the ingenuity, creativity, and strength of the American people.

The draft State of the Union speech presented to Roosevelt by his staff on that New Years Day in 1941 contained many of Roosevelt's familiar appeals to support the Allies by transforming the United States into the "Arsenal of Democracy." After reading the draft, Roosevelt announced that the speech needed something more. Then he paused in silence for what seemed to his staff to be an eternity. Suddenly, he leaned forward and began to dictate. As Samuel I. Rosenman later recalled, the words "seemed now to roll off his tongue as though he had rehearsed them many times to himself."<sup>4</sup>

1. This article is adapted from the author's remarks presented to the 21st Annual Criminal Law New Developments Course at The Judge Advocate General's School in Charlottesville, Virginia, in November 1997.

2. See, e.g., STUART MURRAY & JAMES McCABE, NORMAN ROCKWELL'S FOUR FREEDOMS 101-8 (1993). The concept of the "Four Freedoms" was the unifying theme in Roosevelt's annual message to the Congress delivered on 6 January 1941, eleven months before the United States entered World War II. 87 CONG. REC. 44 (1941).

3. For descriptions of the events surrounding development of the Four Freedoms theme, see, e.g., JAMES MACGREGOR BURNS, ROOSEVELT: THE SOLDIER OF FREEDOM 33-35 (1970); MURRAY & McCABE, *supra* note 2, at 3-6; SAMUEL I. ROSENMAN, WORKING WITH ROOSEVELT 262-63 (1952).

In the speech he dictated, and subsequently delivered before a joint session of Congress, Roosevelt spoke of—

[A] world founded upon four essential human freedoms.

The first is freedom of speech and expression—everywhere in the world.

The second is freedom of every person to worship God in his own way—everywhere in the world.

The third is freedom from want—which, translated into world terms, means economic understanding which will secure to every nation healthy peacetime life for its inhabitants—everywhere in the world.

The fourth is freedom from fear—which, translated in to world terms, means a world-wide reduction of armaments to such a point in such a thorough fashion that no nation will be in a position to commit an act of aggression against any neighbor—anywhere in the world.<sup>5</sup>

He challenged the American people to understand that his remarks were

no vision of a distant millennium. It is a definite basis for a kind of world attainable in our own time and generation. That kind of world is the very antithesis of the so-called new order of tyranny which the dictators seek to create with the crash of a bomb.<sup>6</sup>

At a time when debate in this country raged between those who favored an all powerful government in both the foreign and domestic spheres and those who favored isolationism and a minimal role for government, Roosevelt set forth his view of a more balanced approach. His Four Freedoms reflected a belief in a government that was strong but not overbearing; a government that was grounded not on goals of efficiency but on a belief in the virtues of liberty.

The first two freedoms that he cited—freedom of speech and freedom of religion—involved freedom from government. The last two—freedom from want and freedom from fear—contemplated an active role for the government in promoting economic security at home and abroad and a dynamic role for the United States in securing international peace.

The speech, along with Roosevelt’s “Arsenal of Democracy” fireside chat, set the stage for the critical debates in 1941 over military preparations and aid to Britain. After Pearl Harbor and America’s entry into the war, the Four Freedoms were brought to life through the work of another great American, Norman Rockwell, whose classic paintings depicted—

Freedom of Speech, as shown in a New England Town Meeting.

Freedom of Worship, depicting the offering of prayer by individuals of diverse backgrounds, races, and creeds.

Freedom from Want, illustrated by the gathering of an extended family at a traditional Thanksgiving.

Freedom from Fear, showing parents tucking their children into bed at night, while a newspaper headline carries the tragic news of a world at war.<sup>7</sup>

Roosevelt’s words and Rockwell’s paintings became the centerpiece of many programs and activities designed to create a greater understanding of the many sacrifices that the American people were called upon to make during the war. A nationwide tour of the paintings was viewed by over 1.2 million people, and raised over \$130 million in war bonds—an astonishing sum in those days.<sup>8</sup> Poster-sized reproductions were distributed throughout the nation, and to military units throughout the world. An airman stationed in Alabama at what was then known as Maxwell Field, after viewing Rockwell’s Freedom of Speech poster, wrote: “I am indeed thankful that I am able to help defend that right.”<sup>9</sup>

Roosevelt’s intent in focusing on the Four Freedoms went beyond the immediate needs of wartime propaganda. His prior experiences in life had convinced him of the need to prepare America not only for the conduct of war but also for the world

4. ROSENMAN, *supra* note 3, at 263.

5. 87 CONG. REC. 46-47.

6. *Id.* at 47.

7. See MURRAY & McCABE, *supra* note 2, at 45-51.

8. *Id.* at 91.

9. *Id.* at 65.

that would follow. Earlier in his career, as a member of President Wilson's World War I administration, Roosevelt had observed first-hand the tragic failure of the United States to participate in the post-war League of Nations.<sup>10</sup> Without diminishing America's attention from the successful prosecution of World War II, Roosevelt—through the evocation of the Four Freedoms—sought to prepare the American people for the mantle of leadership in the post-war environment.

As Senator Daniel Patrick Moynihan noted, Roosevelt's vision has prevailed.<sup>11</sup> To quote Moynihan: "The liberal tradition of the West, enlarged and enhanced in the awful travail of the twentieth century is now almost everywhere celebrated after three quarters of a century on the defensive."<sup>12</sup>

Look at what has happened, not only in our lifetime, but also in the lifetimes of our children. When I came to Charlottesville as a new judge advocate in 1976, the Cold War was the central focus of our national security policy. Today, the Soviet Union is no more, and its former puppet states are striving to achieve meaningful democracy. Judge advocates and other military officers participate in a wide variety of training teams that comprise an important part of that effort. While there are many parts of the world where the Four Freedoms have yet to achieve their full flowering, there is—as Senator Moynihan noted—no competing vision.

There are some interesting parallels with the development of the contemporary military justice system. Just as Roosevelt's vision of the Four Freedoms was forged in the crucible of Wilson's failed efforts on behalf of the League of Nations, the post-World War II debate over the UCMJ was heavily influenced by the largely unsuccessful efforts to reform the military justice system in the aftermath of World War I.<sup>13</sup> The military justice system, as it existed in World War I, did not require the provision of a trained attorney to serve as counsel for the accused, and there was no formal appellate review.<sup>14</sup> In one well-known incident, sentences to death at a domestic post were carried out before the case could be subjected to even the most rudimentary appellate review.<sup>15</sup>

Although a few legally trained military officers worked with interested civilians to propose a more formal role for lawyers at trial and appeal, the nation was weary of war and appeared to have little enthusiasm for international relations or military affairs. The post-World War I military justice debate, in today's terms, was largely "inside the beltway," and few changes were made.

The post-World War II environment was different. Perhaps because the war lasted longer, perhaps because there were more courts-martial—more than two million were held—and perhaps because our leaders had prepared the nation for a more active international role after the war, the interest in military justice remained high. Perhaps the emphasis on concepts like the Four Freedoms caused returning veterans to take a hard look at all aspects of military service and assess whether their experiences measured up to the ideals for which they had made so many sacrifices.

After World War II, veterans and their organizations throughout the nation, as well as many returning veterans who served in Congress, promoted a major national debate about military law, which led to the establishment of the UCMJ.<sup>16</sup> Just as Roosevelt's Four Freedoms represented a pragmatic blend of historic and intellectual trends, the same considerations were reflected in the development of the UCMJ. The debates inside the newly formed Department of Defense and in Congress were characterized by a variety of competing proposals—ranging from cosmetic changes to complete civilianization.<sup>17</sup>

The final product, like Roosevelt's Four Freedoms, represented a balance of concerns about individual liberty and the need for effective government action. On the one hand, there were major reforms, including the primacy of lawyers as advocates and presiding officers at trial and on appeal, as well as the creation of our court—an independent civilian tribunal.<sup>18</sup> On the other hand, these reforms were balanced by disciplinary concerns reflected in the continuation of uniquely military offenses and the primary role of commanders in the disposition of

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10. *Id.* at 39. See BURNS, *supra* note 3, at 607; Daniel Patrick Moynihan, Address at the Lyndon Baines Johnson Room, U.S. Capitol, in Commemoration of the 50th Anniversary of President Franklin Delano Roosevelt's Four Freedoms Speech (Jan. 30, 1991) (on file with author).

11. Moynihan, *supra* note 10, at 4.

12. *Id.*

13. See WILLIAM T. GENEROUS, SWORDS AND SCALES ch. 1 (1973); JONATHAN LURIE, ARMING MILITARY JUSTICE chs. 3-5 (1992); Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967); Frederick Bernays Wiener, *The Seamy Side of the World War I Court-Martial Controversy*, 123 MIL. L. REV. 109 (1989); Frederick Bernays Wiener, *American Military Law in the Light of the First Mutiny Act's Tricentennial*, 126 MIL. L. REV. 1, 16-24 (1989).

14. See Brown, *supra* note 13, at 18-33.

15. See *id.* at 3-4.

16. Act of May 5, 1950, Pub. L. No. 81-506, 64 Stat. 108 (1950). See GENEROUS, *supra* note 13, ch. 4; LURIE, *supra* note 13, ch. 6.

17. See LURIE, *supra* note 13, at 126-49.

charges.<sup>19</sup> That system of military justice, with relatively few changes, served our country throughout the Cold War, through its harsh baptism on the frozen fields of Korea, in the jungles of Vietnam, in *Desert Shield* and in *Desert Storm*, and during the years of hard but tenuous peace at home and abroad.

To return, for a moment, to contemporary consideration of Roosevelt's Four Freedoms, I would note that the challenge for our generation is not simply to complete Roosevelt's vision but to ensure that it endures. I have always felt very close to that vision—not only because I was raised and educated in upstate New York, less than five miles from Roosevelt's home and library—but also because I was raised and educated by men and women who had experienced the Depression, fought in World War II, and achieved adulthood during the Cold War. Those experiences—which were brought to life for me by those who had lived them—are all too remote for our children.

In a time of relative peace and prosperity, how do we convey to the younger generation that freedom cannot be taken for granted? How do we prepare the next generation to preserve freedom when confronted with the massive technological, social, and economic changes that are likely to characterize the Twenty-first Century?

I would not pretend to suggest a definitive answer, but there are some things that each of us can do in both our personal and professional lives. With respect to our personal lives, we can teach the next generation about the history of our country and the struggle to maintain freedom in a changing world. There are wonderful children's books, thought-provoking museums, and outstanding national park sites that can have an enormous impact on the younger generation. There are numerous opportunities, around the dinner table, to relate current events to the struggles of the past. If we resolve, through our schools, our civic associations, and our families, to make that history come alive for our children, then we at least will have provided them with an intellectual foundation to build the institutions of the future that will preserve and protect the concept of freedom. In our professional lives, we can consider how to use history as an effective tool of advocacy in judicial and legislative forums, which I shall address in the second half of this Article.

## The Importance of Historical Perspective in the Consideration of Contemporary Military Justice Issues

The effective use of history in the development of military law is reflected in the experiences of two of the giants of military law—William Winthrop and Frederick Bernays Wiener.<sup>20</sup> Both Winthrop and Wiener had first-hand experience with military affairs in wartime. Winthrop was a thirty-year old lawyer in private practice at the outset of the Civil War. He and his brother responded to President Lincoln's call for volunteers. His brother died in action and Winthrop saw active combat service. His conduct in the field resulted in several wounds and promotion to Captain. In 1863, he was assigned to duty in Washington in the Judge Advocate General's Office. After the War, he obtained a commission in the Regular Army, and remained on active duty until 1895. His period of post-Civil War service encompassed the time in which he produced his two classic works, the *Digest of Opinions of the Judge Advocate General*, and his oft-cited *Military Law and Precedents*.<sup>21</sup>

Frederick Bernays Wiener, like William Winthrop, was a civilian practitioner for several years before entering military service. Wiener took a reserve commission in 1936, and was called to extended active duty in March 1941, on the eve of World War II. At the outset of the war, he served as staff judge advocate for a command that covered most of our forces in the West Indies, then served in the Pacific in New Caledonia and on Guadalcanal. After a tour in Washington, he served with the Tenth Army during the Okinawa invasion and then in the Military Government Section during the occupation of that island. Following the war, he was with the Solicitor General's Office for three years, arguing a number of cases before the U.S. Supreme Court. Subsequently, he developed an active appellate practice, during which he was prevailing counsel in many of the cases that established the constitutional framework for jurisdiction over civilians, including the landmark case of *Reid v. Covert*.<sup>22</sup> He also taught appellate advocacy and military law at George Washington University, authored numerous books and articles covering a wide range of legal topics in both the civilian and military arenas, and continued his military service in the Reserves.

18. See, e.g., Act of May 5, 1950, arts. 26, 27, 28, 66, 70; 10 U.S.C. §§ 826, 827, 838, 866, 870 (1952).

19. See, e.g., Act of May 5, 1950, arts. 22, 23, 24, 60, 64; 10 U.S.C. §§ 822, 823, 824, 860, 864.

20. For biographical information on Winthrop, see, e.g., U.S. ARMY, *THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975*, 96-100; George S. Prugh, Jr., *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 A.B.A. J. 126 (Feb. 1956). For information on Wiener, see, e.g., H.R. 2498, 81st Cong. (1949); Frederick Bernays Wiener, *The Teaching of Military Law in a University Law School*, 5 J. LEGAL EDUC. 475 (1953); Proceedings in memory of Frederick Bernays Wiener, 46 M.J. 204 (1996).

21. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* (photo. reprint 1920) (2d ed. 1896).

22. 354 U.S. 1 (1957).

Wiener began his legal career when Oliver Wendell Holmes was still sitting on the Supreme Court, and it is apparent that he was deeply influenced by the thrice-wounded Civil War veteran—described by Wiener as “America’s outstanding soldier-jurist.”<sup>23</sup> Drawing on a variety of speeches delivered by Holmes, Wiener observed that “the military lawyer is, in a very real sense a special breed, one who combines with the reason of the lawyer the faith of the soldier.”<sup>24</sup> He emphasized, however, that a military lawyer need not replicate Holmes’ combat experience in order to be successful: “[T]he military lawyer [need not] be a certified combat hero, or have successfully completed the ranger course, or be able to function as a parachutist, or as a frogman, or as a submariner . . . [T]he military lawyer must have, at an irreducible minimum, a high degree of moral courage.” He noted that the military lawyer must, of course, treat with respect all of his military superiors. What they direct after discussion must be the guideline of his conduct. But, he added, the military lawyer “is bound to be fearless in tendering advice and in stating his opinion.”<sup>25</sup>

Wiener was deeply influenced by Holmes’ view, expressed with characteristic understatement, that: “[h]istoric continuity with the past is not a duty, it is only a necessity.”<sup>26</sup> Wiener’s appellate briefs and scholarly writings reflected an intimate and intense familiarity with the original documents that formed the military law of this country, going well beyond treatises and statutes to include the court-martial orders, records of trial, and review proceedings of the Eighteenth, Nineteenth, and Twentieth Centuries. As I recently re-read his classic 1958 *Harvard Law Review* articles on the application of the Bill of Rights to the military,<sup>27</sup> filled with detailed descriptions of long ago courts-martial, I realized that he must have spent hundreds if not thousands of hours at the National Archives and other repositories pouring over records of trial, organizing the material, and making it come to life.

What is remarkable about Fritz Wiener is that he was not primarily a student of military law, but instead was an active practitioner with a wide range of interests in civil matters and English legal history. In his writings on military law, he dem-

onstrated a consummate knowledge of parallel developments in civilian law and military policy that enabled his audience—lawyers, scholars, and policy makers—to understand the context of the evolution of military law.

In the course of refuting the proposition that the Framers intended the Bill of Rights to apply to the armed forces, Wiener vividly depicted numerous courts-martial, including the 1814 trial of Brigadier General William Hull, the superannuated Revolutionary War hero who surrendered Detroit in 1813 without a shot. At the court-martial, which featured an appearance by Martin Van Buren as a special judge advocate assisting the prosecution, Hull was found guilty and sentenced to be shot to death—they certainly had a highly focused concept of accountability back then—but with a recommendation for clemency in consideration of his Revolutionary War service and advanced age. Exercising the right provided in law at the time for an officer to submit grounds for appeal to the President, Hull protested the court’s ruling that his counsel had been restricted to providing the accused with written assistance and could not address the court. Wiener pointed out that President Madison, commonly regarded as the father of the Bill of Rights, approved the court-martial despite the denial of counsel rights that would otherwise be applicable under the Sixth Amendment. Although Madison determined that the results of trial were correct in law, he remitted the sentence as a matter of clemency.<sup>28</sup>

Although Wiener’s articles have been cited for the proposition that civilian constitutional rights should not be judicially incorporated into military practice as a matter of constitutional law,<sup>29</sup> his in-depth understanding of military history was also used to challenge portions of the UCMJ granting jurisdiction over civilians in peacetime, provisions which Wiener demonstrated to be inconsistent with traditional military practice in his winning Supreme Court briefs in *Reid v. Covert* and the related cases.<sup>30</sup> Wiener’s encyclopedic knowledge of military law was reflected in the variety of cases he would cite, ranging from a 1797 court-martial of an officer for violating a general order against “keeping a mistress”<sup>31</sup> to the execution of three officers in 1792 for desertion.<sup>32</sup>

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23. Frederick Bernays Wiener, *Advocacy at Military Law: The Lawyer’s Reason and the Soldier’s Faith*, 80 MIL. L. REV. 1 (1978).

24. *Id.* at 3.

25. *Id.* at 3-4.

26. Wiener, *supra* note 20, at 489-90 (1953) (quoting HOLMES, LEARNING AND SCIENCE, IN COLLECTED LEGAL PAPERS 139 (1921)).

27. Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I & II*, 72 HARV. L. REV. 1 (1958); 72 HARV. L. REV. 266 (1958).

28. *Id.* at 29-31, 45.

29. *See, e.g.*, *Middendorf v. Henry*, 425 U.S. 25, 33-34 (1976) (declining to reach the constitutional question of whether the right to counsel applies to summary courts-martial on the grounds that a summary court-martial is not a criminal prosecution within the meaning of the Sixth Amendment.)

30. *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Kinsella v. Krueger*, 354 U.S. 1 (1957).

31. Wiener, *supra* note 27, at 275 n.376.

His purpose was to ensure accuracy in legal and legislative decision-making, not to defend the status quo. This point is emphasized in his classic 1958 articles on the Bill of Rights. After concluding that the Framers did not intend the Bill of Rights to apply to military personnel, he emphasized that “it does not follow . . . that members of those forces must be held to have no constitutional rights today, or that they must be held to be unable to protect their rights in the same manner and by the same proceedings that are now available to civilians.”<sup>33</sup> He made four specific points in this regard. First, Congress had filled the gap in many instances by specifying rights under the UCMJ.<sup>34</sup> Second, the then-Court of Military Appeals was “giving to the statutory provisions a content which, in most instances, is indistinguishable from that of the constitutional norms regularly formulated and applied in the federal courts.”<sup>35</sup> Third, in civilian life, the concept of due process has gone far beyond the rights contemplated by the Framers, including rights provided to non-citizens.<sup>36</sup>

Finally, and perhaps most important—the position, number, composition, and recruitment of the armed forces is so different by comparison with 1789-1791 that an approach which was adequate and commonplace then is wholly unsatisfactory and inappropriate today. Soldiers then were a few professionals; in today’s wars, whole nations are in arms. Then a commander could disapprove proceedings in which a lawyer appeared because the tribunal was “a Court of Honor.” Today the court-martial has developed into a court of general criminal jurisdiction.<sup>37</sup>

Weiner anticipated that the Due Process Clause would be read to include military personnel, with the debate taking place not over whether military personnel had constitutional rights, but where “to mark out a line from case to case with due regard to the actualities of the military situation.”<sup>38</sup>

Wiener was a strong supporter of the military’s professional legal education programs, and what he described as “the excellent training” at the military’s law schools.<sup>39</sup> He lamented,

however, the paucity of attention to military law by the nation’s leading universities. Noting that legal scholarship should go beyond practical training, he quoted an observation from Holmes in 1886 that rings true today:

It is from within the bar, not from outside, that I have heard the new gospel that learning is out of date, and that the man for the times is no longer the thinker and the scholar, but the smart man, unencumbered with other artillery than the latest edition of the Digest and the latest revision of the Statutes.<sup>40</sup>

It sounds like Holmes was talking about a brief that contains nothing more than citations to the *Manual for Courts-Martial* and references to the most recent appellate cases, without any reflection of the underlying purposes or historical development of the legal principles at issue. Holmes added: “the aim of a law school should be . . . not to make men smart, but to make them wise in their calling—to start them on a road which will lead them to the abode of the masters.”<sup>41</sup>

For Wiener, this meant that the teaching of military law should not rest on the “narrow footing of ‘military justice’”—that is, how to try and defend a court-martial case—but should encompass “the constitutional extent of military power and the relation between civil and military jurisdiction . . . the war powers . . . martial law . . . and military government.”<sup>42</sup> I believe he would be pleased to see the broad curriculum offered at The Judge Advocate General’s School in Charlottesville, Virginia, and at the other military law schools, as well as the nascent development of courses at the civilian law schools that address problems in national security law. Such offerings, however, are few and far between.

This is more than a matter of academic concern. Although some appellate issues can be resolved by resorting to leading cases from the digest, many require an understanding of the personnel rules and other administrative matters that govern

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32. *Id.* at 287 n.483.

33. *Id.* at 294.

34. *Id.*

35. *Id.*

36. *Id.* at 298-301.

37. *Id.* at 301-02.

38. *Id.* at 303.

39. Wiener, *supra* note 20, at 481.

40. *Id.* at 480.

41. *Id.*

42. *Id.* at 482.

military life. The most important cases require a deep appreciation of military justice in its larger context—the conduct of military policy, the war powers, the separation of powers, and the role of military justice in projecting military power. When such matters are addressed through buzz words rather than critical scholarship, the courts are deprived of an important source of analysis. Moreover, when military justice issues are debated by policy makers in the executive or legislative branches without the benefit of historical perspective and past example, these deficiencies cannot be overcome by a thousand buzz words.

Wiener relied heavily on Winthrop's treatise, and quoted with approval the observation of another commentator that:

Military Law and Precedents was a masterpiece of painstaking scholarship, brilliant erudition, and lucid prose. It collected for the first time in one work precedents which constitute the framework of military law, gleaned from a bewildering and unusual mass of statutes, regulations, orders, and unpublished opinions from the amorphous body of customs of the service reposing in scattered fragments in the works of military writers and the minds of military men. What Lord Chief Justice Sir Edward Coke did through his Reports and Institutes for the common law Colonel William Winthrop did through his digest and Military Law and Precedents for military law.<sup>43</sup>

Wiener, in 1953, lamented the fact that no one had sought to replicate Winthrop's endeavors for twentieth century military law, particularly in terms of organizing material related to the punitive articles.<sup>44</sup> Nearly half a century later, the gap remains unfilled. Despite the extensive and intense experiences of this nation with military law during the combat environments of the two World Wars, Korea, and Vietnam, as well as experiences of the Cold War and the Gulf War, the focus of military legal scholarship has been almost exclusively on matters of procedure, with far less attention to substantive crimes. As a result, litigation and policy debates concerning substantive crimes

often rely exclusively on a few citations from the current digests and a cursory reference to Winthrop. The absence of a serious historical perspective may well reflect the fact that there is no modern authoritative treatise that addresses twentieth century substantive crimes in the same manner that Winthrop addressed the punitive articles in his time.

Admiration for the work of Winthrop and Wiener does not require an uncritical acceptance of their views. There are any number of points made by each, some of considerable significance, with which the reader may disagree. Wiener, himself, acknowledged that some of his predictions had been disproved by experience. What Wiener contributed was not so much his specific recommendations, but the remarkable degree of information and perspective that helped decision makers—in the Pentagon, Congress, and the courts—resolve difficult legal and policy choices.

Today, military discipline and the operation of the military justice system is the focus of more internal and external attention than perhaps at any time since the immediate post-World War II era. Some have asked how much of that attention is informed by a critical understanding of the origins and purposes of military law.

When approaching critical issues of contemporary military law, whether as litigation counsel or legislative counsel, it is useful to ask whether a particular discussion of military law is sufficiently informed by an understanding of the relationship between the law and the history of military activities affected by the law. It is also useful to ask whether today's decision makers—before they determine whether to retain or modify current laws, regulations, or precedents—are being provided with briefs, legislative proposals, and scholarly publications of the same high quality as the materials provided to yesterday's leaders by William Winthrop and Frederick Bernays Wiener. It may be unrealistic to expect that every attorney will produce work of such high caliber in every case, but it is not unrealistic to expect emulation of the standards set by Winthrop and Wiener in major cases and in the development of rules and statutes.

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43. *Id.* at 488-89 n.74, quoting William F. Fratcher, *Colonel William Winthrop*, THE JUDGE ADVOCATE JOURNAL, Dec. 1944, at 12, 14.

44. *Id.* at 488.